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"LABOR LAW - BASEBALL - STRIKE ONE?"

Delivered by:

William B. Gould IV
Chairman
National Labor Relations Board
Charles A. Beardsley Professor of Law
Stanford Law School (On Leave)

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Fitzpatrick Hall
Queens' College
University of Cambridge
Cambridge, England

It is such a pleasure to be back on this side of the Atlantic, to see so many old friends in this country where I lived as a young student at the London School of Economics 33 years ago, and to have an opportunity to make new friends on this Bastille Day, 1995. Cambridge itself makes the memories tumble out for me, for I was a Visiting Fellow here at Churchill College just 20 years ago and the chance to return to this institution, ever full of both rustic beauty and intellectual vigor, is one that I could not easily decline.

My subject today is U.S. labor law as it relates to professional sports in general and baseball in particular. First though, I will briefly describe the operation of the National Labor Relations Board, the Agency of which I am Chairman, drawing principally upon my primer on labor law.[1] We have been devising a wide variety of innovations during the past 16 months since I came to Washington which attempt to make our statute and Agency both impartial and effective. But the basic structure -- now in existence for a little more than 60 years -- remains intact.

The constitutional basis for the Act is the commerce clause of the United States Constitution, Article I, Section 8. The constitutional theory upon which a statute is predicated is that the fashioning of appropriate procedures for labor and management is necessary to diminish industrial strife that could disrupt interstate commerce. The Act provides that employees are to be protected in their free choice to protest working conditions which they deem to be unfair, to organize or refuse to organize into unions and select representatives, and to obligate both management and labor to bargain in good faith where a union represents a majority of employees in an appropriate unit.

The Board has two main functions -- resolving unfair labor practice controversies and conducting secret ballot box elections amongst employees.

Essentially, through both unfair labor practice and representation election cases, the Board is concerned with establishing the appropriate procedures for both employee free choice and the collective bargaining process. Under the statutory philosophy, the determination of substantive conditions of employment is for the parties themselves.

The subject on which you asked me to speak is proving to be one of the most formidable and cutting-edge issues in labor as well as antitrust

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[1] William B. Gould IV, *A Primer on American Labor Law*, Third Edition, 1993, (MIT Press).

law. The sports industry has presented novel issues to both the National Labor Relations Board, as well as the courts, in relationships in which -- contrary to the general trend in the United States and throughout much of the industrialized world -- unionism has been robust, active and well organized. Nowhere has this been true more than in baseball where, paradoxically, notwithstanding the inapplicability of the antitrust laws, the unions have been able to provide new protections for the players for the past quarter century -- particularly since a 1975 arbitral ruling established free agency for the players. Salary arbitration in which a third party neutral has the obligation to accept one of two "final offers" on the salary to be paid during the coming year has been a feature of the relationship since 1973 -- and I have had the distinct privilege (and, dare I say, pleasure) to act as arbitrator in these disputes in 1992 and 1993. Free agency itself was first enshrined in the 1976 major league baseball industry-wide collective bargaining agreement.

Since the late '60s the Agency which I chair, the NLRB has asserted jurisdiction over baseball, notwithstanding Justice Oliver Wendell Holmes' 1922 Supreme Court decision[2] that baseball is not a business in interstate commerce within the meaning of the Sherman Antitrust Act. Our 1969 decision[3] in which we found baseball jurisdiction is more compatible with contemporary understanding of the commerce clause than was the Holmes' decision of 73 years ago.

Now, one illustration of the importance of labor law in professional sports is the Board's year-old conclusion of a professional football dispute arising between the National Football League and the National Football League Players Association, which provided for a settlement agreement of $30 million in backpay, bonuses and interest to over 1,300 players who participated in the 1987 strike, basketball is front and center, along with baseball where the 1994-1995 dispute has still not been resolved.

The aftermath of the baseball conflict has triggered a searching and sometimes searing reevaluation of the game itself and the way in which it is both played and presented. All the old and well-worn canards about talented athletes shifting to other sports, the lack of superstars in baseball and the length of the game, etc. have now become common cocktail party chatter throughout the land.

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[2] Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).)

[3] The American League of Professional Baseball Clubs, 180 NLRB 190, 191 (1969).

The game is well and alive as a sport. Though, notwithstanding my intense involvement with Great Britain for more than three decades,[4] I have never focused on the details of this country's cricket. My sense has always been that it is comparably cerebral and passionate -- and I am sure that there is an equivalent sense of well-being about the state of that game in this country as well.

But the fact is that the fundamental crisis in baseball in 1995 and in aspects of the law which govern it lie in the ability (or current inability) of the parties to resolve their differences at the bargaining table and to get on with the business of the game itself. It seems clear that frustration with the game now, demonstrated most graphically by plummeting attendance figures, is directly related to baseball fan frustration with both the conduct of the negotiations during the past year or so, as well as lack of positive developments at this moment off the field, not on the field.

President Clinton has proposed legislation providing for binding arbitration of the dispute -- but the Republican-led Congress has expressed no interest in enacting it. A few weeks ago in Minneapolis, I called upon the parties to get back to the bargaining table and resolve their differences -- and I hope that they will do so shortly. Time is a wastin' -- and my hope is that baseball is not confronted with yet another disruption in this new and breathtaking season of '95.

Labor law has become a dominant element in the resolution of professional sports disputes and it is likely that any further continuation of the baseball dispute, as well as basketball, will come before us. The National Labor Relations Act of 1935, as amended, provides for a secret ballot method of resolving disputes about union recognition and representation, as well as a balanced system of unfair labor practice prohibitions applicable to both management and labor. But it does not provide a mechanism for resolving contract negotiations issues except for requiring the parties to bargain in good faith.

The baseball dispute has involved the unfair labor practice portions of the Board's jurisdiction. On March 26 of this year, the Board determined to seek injunctive relief against unilateral changes in free agency and salary arbitration procedures which had been instituted by the owners prior to that time. The relevant portions of the duty to bargain obligation require

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[4] See, e.g., William B. Gould IV, "Taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971," 81 YALE LAW JOURNAL 1421 (July 1972), and William B. Gould IV, "No Coloured Need Apply," COMMONWEAL, March 22, 1968.

that both sides bargain in "good faith" -- that is, with a good faith intent to consummate a collective bargaining agreement (entering into an agreement is not required under the statute) until the point of impasse or deadlock on all mandatory subjects of bargaining.

We concluded that there was reasonable cause to believe that these procedures had not been followed in the baseball dispute and that an injunction requiring the owners to adhere to the status quo ante on these issues, as well as an obligation to bargain in good faith with regard to a new agreement, was appropriate under the circumstances. On March 31, U.S. District Court Judge Sonya Sotomayor agreed with our position and granted relief in the case.

An appeal has been taken to the United States Court of Appeals for the Second Circuit in New York -- and of this writing no decision has been rendered. A proceeding is now taking place on the merits before an Administrative Law Judge which could be appealed to us in Washington. However, as a practical matter, the parties have adhered to the previous agreement's salary arbitration procedures during the '95 season and the controversy has been postponed until later this summer or, depending upon what kind of collective agreement can be negotiated in the coming months, subsequent to the season itself. It is quite possible that the parties will revise the approach to both free agency and salary arbitration in their new collective agreement.

One of the interesting developments from the 1995 baseball injunction and back-to-work agreement is that players are moving with much more frequency among teams -- and not as a result of bidding clubs and free agency. My team, the Boston Red Sox for instance, has only 8 members of the 1994 team on the 25 man roster. Most of the other 17 were obtained on waivers or for minimum or relatively modest salaries rather than major contracts. Even those contracts that could be characterized as major ones, are considerably below those that have been obtained in recent years.

Knuckleballing Tim Wakefield has 7 victories and a brilliant 1.61 ERA at this week's All-Star Game break -- all for the minimum salary, albeit $109,000! His teammate in the pitching rotation, All-Star squad member Erik Hanson, does not possess the all too familiar multi-million dollar contract -- though well above the minimum.

All this suggests that the constraints imposed and ultimately negotiated might conceivably be a less important feature than that which has been ascribed to them. The fact that the Red Sox still have a

comfortable first place perch in the American League Eastern Division -- three games ahead of the surprising but pitching poor Detroit Tigers -- as well as the success of the Montreal Expos in '94 -- they trail only the Phillies and Braves in the Division this year -- may yet induce baseball and other sports to emphasize old fashioned ingenuity and creativity. These characteristics, both before and since the advent of free agency seem to have been the best method for promoting team success.

Of course, what happened in 1995 was that there was an unprecedented number of free agents available to the teams. This seems to have depressed the salary of players and made more teams, like the Red Sox, interested in some of the many free agents who possess major league experience. It is quite possible that the 1995 experience may presage a movement away from salary arbitration, at least as it existed under previous agreements, which the owners object to considerably -- to more of a free market system through free agency. Both sides, for different reasons, might find it difficult to object to such a development.

The owners have been concerned that salary arbitration simply ratchets up the salaries paid for free agents. The two systems, free agency and salary arbitration, were developed separately -- the latter because of the owners' concern that the Supreme Court's 1972 ruling in the Curt Flood decision (it reiterated the antitrust laws' inapplicability to baseball) would produce new arguments about the inequity inherent in owners deciding all salaries on their own and the former arising out of the 1975 arbitration award which declared baseball players to be free after playing out their so-called "option" year.

Notwithstanding the Curt Flood decision's adherence to the doctrine of stare decisis, the fact of the matter is that labor law, whatever its deficiencies,[5] has played a significant role in the world of baseball and in other professional sports. The statutory support for collective bargaining has been facilitated by virtue of the Board's assertion of jurisdiction. Arbitration awards creating free agency were enforced in the federal courts under the standards of deference accorded arbitration awards by the United States Supreme Court for the past 35 years.

And, perhaps most important of all, the 1995 baseball season has been played because of the Board's March 26 decision to intervene in federal district court to obtain an injunction. This injunction prompted the players to agree to go back to work. The owners then agreed to accept

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[5] William B. Gould IV, *Agenda for Reform: the Future of Employment Relationships and the Law*, (MIT Press) 1993.

them without a lockout. As noted above, the existing system has thus governed the baseball season which is now at the All-Star mid-season break. The Board's order obtained from the federal district court on March 31 has mandated that the parties return to the collective bargaining table which I hope will commence at some point within the very near future.

The Board has no authority to oblige the parties to continue the 1995 season -- or to fashion an agreement for them. Under our system of voluntary collective bargaining, that process is for the parties themselves. The Board's only role is to insure adherence to the proper procedures, to rid the process of unlawful impediments and to provide for an appropriate framework for future collective bargaining.

Admittedly, had the owners been able to use their new system of free agency, apparently the Red Sox would have been able to sign fireballing relief pitcher John Wetteland of Montreal -- because the small market Expos could not have matched the Red Sox' offer under their proposed restricted free agent system. But when we obtained our injunction, this opportunity to strengthen the bullpen was lost. No restricted free agent system was part of the status quo ante. And the Expos, prompted by an overriding need to avoid salary arbitration with Wetteland, traded him to the hated New York Yankees for valuable minor league players which the Red Sox did not possess.

This was then one of the terrible unintended consequences of our March 26 decision to seek an injunction. My hope is that my insistence upon adherence to labor law will not cost he Red Sox the pennant as they move down the stretch. Perhaps the acquisition of Rick Aguerila will wipe out any regrets that I may have held about the importance of the rule of law in industrial relations.

Meanwhile, the basketball owners -- through their Commissioner David Stern, holder of an office which is vacant right now in baseball, have declared a lockout of the players effective June 30. This arises out of a dispute involving luxury taxes on player salaries similar in concept to those put forward in other sports -- as well as a salary cap for rookies. The luxury tax concept is designed to discourage the richer baseball clubs from paying what the clubs view as excessively high salaries compared to less successful clubs. Both sides thought that the latter would be particularly non-controversial given the political impotence of the rookies who were not in the bargaining unit at the time that the rules were being established. But neither side counted upon a powerful political influence in all major sports, i.e., the agents.

The agents negotiate rookie salaries as well as those for established superstars, and they appear to have been successful in convincing such well publicized players as Michael Jordan and Patrick Ewing that the rookie salary cap threatens the salaries of more established players. The owners and the union seem to have taken the position that there is a finite pie and, by capping rookie salaries, more money will go to the established superstars.

Unlike baseball which is not governed by the antitrust laws, as least as they relate to labor relations, basketball is driven by both antitrust and labor law. Some of the players have filed a decertification petition and instituted a antitrust action as well. Although there could be dissatisfaction with the leadership of the union on the part of some of the players as well as the agents, the fact is that some of the developments are driven by recent decisions of the Court of Appeals for the District of Columbia and the Second Circuit in New York. These holdings give no role to antitrust law and consequent treble damage liability where unreasonable restraints are placed upon player mobility -- unless there is an elimination of the relationship between management and labor altogether through the filing of a decertification petition.

Accordingly, under existing law, the basketball players who filed the decertification petition would not only rid themselves of the union with which they may be dissatisfied but gain an antitrust weapon through the one method available to them, i.e. the threat or actuality of an elimination of the collective bargaining process itself. Surely the incentive of gain access to antitrust remedies at the price of collective bargaining is not a good result under a federal labor policy which promotes collective bargaining.

Thus, an issue which arises in basketball is to the relationship between labor and antitrust law. Sometimes the Board takes legal action to restrain other judicial proceedings that undermine our own jurisdiction. Our New York Regional Director, Dan Silverman, has been quoted in the press to the effect that he is considering initiating action in connection with the antitrust case on the ground that it may interfere with the exercise of our own jurisdiction in representation cases. Ultimately, this issue may or may not come before the Board in Washington to resolve and would present what could be yet another unusual proceeding involving labor law and professional sports.

Now we are about to embark upon what baseball fans particularly call the dog days of August. This is the point in the season at which the strengths and frailties of the competing teams begin to emerge most clearly. This is the time for the players and sometimes this NLRB

Chairman of tired muscles, tiresome hours spent on airplanes moving from city to city and the repetitiveness and monotony of strange and sometimes lonely towns.

It is the dog days of August which will test both the bullpens of the Red Sox and the Yankees, as well as our collective bargaining process -- particularly in baseball as well as basketball. But the law can only promote the process -- it cannot impose agreement. That is for the parties themselves and we hope that the encouragement that we have given to the process in Washington during these past 16 months will make it possible for the players and the owners in baseball and basketball to resolve their differences with the utmost dispatch.

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